IN THE

# Supreme Court of the United States

**October Term, 1955**

**No. 48**

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
*Petitioner,*

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD.

## BRIEF OF NATIONAL LAWYERS GUILD AS AMICUS CURIAE

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# INDEX

## TABLE OF CASES CITED

## STATUTES CITED

## AUTHORITIES CITED

De Tocqueville, Democracy in America (Bradley ed., 1945), Vol. I, pp. 263-70 ..... 10

Zechariah Chafee, Jr., The Registration of "Communist Front" Organizations in the Mundt-Nixon Bill, 63 Harv. L. Rev. 1382 (1950) ..... 26

Thomas I. Ericson and David Helfeld, Loyalty Among Government Employees, 58 Yale L. J. 1, 27-28 (1948) ..... 23

Mitchell Franklin, The Encyclopédiste Original and Meaning of the Fifth Amendment, 15 Law. Guild Rev. 41 (1955) ..... 10

John Milton, Areopagitica (Everyman's Library, 1927), p. 38 ..... 36

Arthur E. Sutherland, Jr., Freedom and Internal Security, 64 Harv. L. Rev. 383, 386-8 (1951) ..... 23

Note, The Internal Security Act of 1950, 51 Col. L. Rev. 606, 607 (1951) ..... 26

## MISCELLANEOUS CITED

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### The Interest of the National Lawyers Guild

The National Lawyers Guild is a national bar association formed in 1937, as it then stated,

> "to bring together all lawyers who regard adjustments to new conditions as more important than the veneration of precedent, who recognize the importance of safeguarding and extending the rights of workers and farmers upon whom the welfare of the entire nation depends, of maintaining our civil rights and liberties and our democratic institutions, and who look upon the law as a living and flexible instrument which must be adapted to the needs of the people."

Since its formation the National Lawyers Guild has consistently sought to arouse the talents and energies of the

legal profession in the solution of the urgent problems facing American democracy. In this task it has attempted to make a contribution on numerous controversial issues of domestic and foreign policy; and it has on many occasions undertaken the defense of unpopular causes where it conceived important legal principles to be at stake. Occupying as it has a position somewhat to the left of center, it has experienced at first hand some of the official and unofficial pressures that have sought, particularly in the last few years, to curb the activities of liberal groups in this country.

The National Lawyers Guild therefore appreciates the opportunity, made possible by the consent of the Solicitor General and counsel for petitioner, to present its views on the far-reaching issues involved in this case. It does so from the standpoint, not of the Communist Party which is ably represented here, but of liberal lawyers deeply concerned with the impact of the legislation under review upon the civil liberties of the whole nation. It will attempt to present to the Court certain considerations from the vantage point of attorneys who have participated in the defense of those civil liberties and who have seen modern repressions at work.

Our views will be restricted to two of the most significant constitutional issues: (1) the validity of the registration provisions of the Internal Security Act under the First Amendment, and (2) the validity of those provisions under the self-incrimination clause of the Fifth Amendment.

## Summary of Argument

### I(A)

The registration provisions of the Internal Security Act operate to destroy organizations required to register thereunder by branding the organization and its members as part of a movement dedicated to "treachery, * * *

espionage, sabotage, terrorism". Because the stigma is affixed through official proceedings, wherein limited review by the courts creates the impression of judicial sanction, the effect of the branding is intensified. The stigma attaches not only to the organization, but also to individual members, both of "Communist-action" and "Communist-front" organizations, since the names and addresses of all Communist-action members and of all "Communist-front" donors of funds (which includes dues-paying members) must be disclosed for public record.

In addition to the stigma, members of registered organizations become, in effect, public nominees for criminal prosecution under the Smith Act, under Section 4a of the Internal Security Act and under other laws. Members of registered organizations also suffer numerous other financial deprivations such as blacklist from various types of employment, denial of passports, etc., and are subjected to a great many non-governmental sanctions and pressures.

It is unlikely that any registered organization could survive and retain its members much less secure new members in the light of these sanctions.

Penalties for failure to register and for false registration are a serious source of danger to leaders and members of the organization. Every action of a registered organization involving a financial transaction is to be revealed under the law and made available to a hostile press and public; and every person who actively participates in a "Communist-action" organization finds his conduct recorded for inspection by every government authority with subpoena power. What appears thus to be a simple disclosure regulation, similar to lobbying and newspaper registration requirements, becomes in context—particularly in the light of the criteria of membership set forth in Section 5 of the Communist Control Act—a tangle of legal traps.

The object of this Act is to prevent and to punish conduct not subject to existing law—those activities in support of

the world Communist movement which are carried on through traditional and legitimate methods of peaceful political action.

The impact of the registration provisions not only suppresses rights of free speech and association of organizations required to register but reaches beyond those organizations to encompass and restrict the First Amendment freedoms of the whole liberal movement. For the standards of what constitutes a "Communist-front" organization are so broad that any organization whose policies do not differ sharply from those of the Communist Party on any public issue has reason to fear possible application of the Act. And the standards of membership are so vague that few individuals will risk joining voluntary associations which engage in any sort of political activity.

## I(B)

The issue presented to the Court is whether the Government has power, in spite of the First Amendment, to adopt measures which prevent a political association from engaging in the usual types of political activity because the organization is or may be tainted with other illegitimate activity or is controlled by a tainted organization.

The requirement to register is made without proof of illegitimate activity and the disabilities resultant from registration are imposed on all activities—legitimate or otherwise—of the organization. In thus preventing peaceful political association, the Act clearly violates the First Amendment under the doctrine of *DeJonge* v. *Oregon*, 299 U. S. 353 and *Herndon* v. *Lowry*, 301 U. S. 242.

The principle of the *DeJonge* case does not rest upon any application of the clear and present danger test. Neither there nor in the *Herndon* case did the Court rely on or even mention that test. The reason is that any consequences arising from the legitimate activity repressed

here, as in the *DeJonge* case—the holding of peaceful meetings, the support of candidates in elections, the issuance of leaflets and books containing normal political discussion—cannot be "an evil that Congress has a right to prevent." If such normal political conduct could be considered as giving rise to an "evil" then there would be no meaning left to the First Amendment. Consequently the findings of Congress, the Board and the lower Court with respect to clear and present danger are wholly irrelevant to the issue now before the Court. *A fortiori* any test of "reasonableness" is inapplicable under the *DeJonge* rule.

Apparently the two main reasons behind the suppression of the legitimate activities of "Communist-action" and "Communist-front" organizations, are that these organizations are said to operate to "advance the objectives" of the world Communist movement and that they are "dominated or controlled" by a foreign government. To the extent that advancing the objectives of the world Communist movement is pursued through peaceful and democratic means, such action is protected by the First Amendment. The Government can properly concern itself only with the methods and not with the goals of political action.

The kind of foreign control envisaged by the Act and found by the Board in this case cannot operate to change the *DeJonge* rule. The character of the "foreign control" which stamps an organization as a "Communist-action" group is illustrated by the standards embodied in Section 13(e) which authorizes the Board to rely on such matters as the extent to which activities of an organization "do not deviate from those of such foreign government" and allows the Board to make and offer as relevant such findings as it did here that "a substantial number of respondent's present leaders * * * have been to the Soviet Union on numerous occasions * * * and have been * * * trained in the Soviet Union on Russian strategy and policies" (Bd. Rep't., p. 20).

To say that by reason of "foreign control" of such a character a domestic organization can be restrained by the Government from pursuing legitimate political activity, would strike at the heart of the First Amendment and deny its freedoms to any organization with international affiliations, such as the Roman Catholic Church and Zionist organizations.

## I(C)

The registration provisions are invalid under the First Amendment for an additional reason—that they are not drawn narrowly enough to meet the specific abuses Congress sought to correct. Legislation impinging on First Amendment rights must meet the specific abuse and may not "sweep within its orbit" a mass of other matters with which Congress has no power to concern itself. *Schneider* v. *State*, 308 U. S. 147, and others.

## I(D)

The legislation now before the Court infringes upon freedom of expression to a degree never before approached by an Act of Congress. The Court must decide whether sweeping restrictions operating to harass free expression of the liberal movement will be sustained because they are ostensibly directed at the Communist movement. The issues and the times call for firm adherence to the fundamental purpose the First Amendment was designed to serve.

## II

The Act violates the Fifth Amendment privilege against self-incrimination by requiring individual members of a "Communist-action" organization to profess membership in an organization which, by legislation ranging from the Smith Act to the Internal Security Act to the statute outlawing the Communist Party, has again and again been branded a criminal conspiracy by the Congress.

It is clear that upon a proper claim of privilege disclosure of membership in the Communist Party cannot be compelled. *Quinn* v. *U. S.*, 349 U. S. 155, and others. That the Act bars the use of such disclosure as evidence in subsequent criminal proceedings does not relieve the unconstitutionality of the registration requirements because the immunity thus offered falls short of the reach of the privilege. *U. S.* v. *Bryan*, 339 U. S. 323, *Counselman* v. *Hitchcock*, 142 U. S. 457.

The question is at issue now and is not prematurely raised, for unless the constitutional infringement is here asserted, the occasion for asserting it may never arise. While the privilege is personal, so is freedom of association and expression, and the Court recognized the standing of a voluntary association to assert those personal rights of its membership. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123. The issue is timely, for when should the privilege be asserted by the individual who claims it? If the organization fails to register, the individual has 60 days in which to register himself. If within that time he fails to do so, or to file a claim of privilege, he may be deemed to have waived the privilege. If within that time he files a claim of privilege, he will have, in effect, directed attention to his possible membership and supplied at least a lead to possible criminal involvement and exposure to countless legal, social and economic sanctions. Where legislation, on its face, involves clear violation of a constitutional guarantee, the earliest reasonable appropriate occasion for reviewing that legislation is the timely occasion to do so.

# ARGUMENT

## POINT I

**The registration provisions of the Internal Security Act, on their face and as applied in this case, violate the constitutional right to freedom of expression as embodied in the First Amendment.**

### A. The Operation of the Registration Provisions

In considering the validity of the registration provisions under the First Amendment it is first necessary to analyze in some detail the actual operation of those provisions, not only as they affect the Communist Party but as they have an impact upon freedom of political expression generally. We will not undertake to summarize the pertinent provisions of the Act—they are fully set forth in petitioner's brief—but will proceed at once to discuss three fundamental aspects of their functioning: (1) the effect upon organizations required to register; (2) the extent to which they curtail the legitimate activities of organizations required to register; and (3) their impact upon the liberal movement generally and upon freedom of expression throughout the whole country.

It should be made clear that we are not, for the moment, concerned with the alleged justification for the registration provisions. Those issues are discussed hereafter. Our present purpose is to show how the structure and operation of the Act works in terms of present political realities.

#### 1. In their actual working the registration provisions operate to destroy or at least hopelessly cripple, any organization required to register.

(a)

The first and overwhelming fact is that any organization forced to register under the Internal Security Act is offi-

cially branded as a disloyal, traitorous and alien group, its members marked as political and social outcasts. By the terms of the Act such an organization and each member is stigmatized as part of a movement dedicated to "treachery, deceit, infiltration * * *, espionage, sabotage, terrorism" (§ 2(1)); which exercises its "control over the people through fear, terrorism, and brutality" (§ 2(2)); whose objective is to set up a totalitarian dictatorship which will be "subservient" to a foreign power (§ 2(6)); and whose followers "repudiate their allegiance to the United States, and in effect transfer their allegiance" to a foreign country (§ 2(9)). This is not simple registration as a lobbyist, or as a spender of campaign funds, or as the owner of a newspaper, or even as a taker of bets. It is registration under a brand that evokes the most bitter emotional response and results in the severest popular sanctions.

Moreover, the branding is accomplished through official proceedings that add greatly to its impact. Formal charges are filed by the Department of Justice; a highly publicized hearing is held, at which dramatic testimony of informers and undercover F. B. I. agents is produced; formal findings are issued by a governmental agency labelled "Subversive Activities Control Board"; the decision is reviewed by the courts in a proceeding which, though limited, creates an impression of judicial approval and adds the prestige of judicial sanction. Once the organization has registered all communication with the public must be stamped with the official brand, thus constantly recreating and reinforcing the original stigma in the public mind.

Furthermore, this process of branding as a public enemy is directed not only against organizations but against individuals. In the case of a "Communist-action" organization the Act requires a listing in the Department of Justice files, open to public inspection, of each member with his address (§§ 7(d), 9). In the case of "Communist-front" organizations the same result is accomplished through the requirement in the Attorney General's regulations that the

source of all funds be given, including the names and addresses of all donors; this compels the listing of all dues payments and hence of all members.[1] Thus every individual member of an organization required to register finds his own name publicly recorded with the Department of Justice as a traitor to his country.

The Act is thus designed to place a badge of infamy upon specified organizations and individuals. Such official branding, by the powerful and authoritative state, has proved an overwhelming sanction in the past. It is perhaps even more effective in modern society. Present day systems of mass communication, pressures for conformity, and methods of opinion manipulation make the ancient punishment of public infamy one of the state's most destructive controls over political expression.[2]

It is scarcely likely that any organization which seeks the support of public opinion in the arena of political controversy could withstand such an attack today. This is particularly true of the alleged "Communist-front" organizations which do not have the degree of resistance to state attack that a more battered and hardened "Communist-action" organization might be expected to have. But even a "Communist-action" organization could hardly be expected to survive except as an underground group.

**(b)**

The registration provisions involve more than stamping with a badge of infamy. An integral part of the scheme imposes other consequences which make membership in a registered organization intolerable.

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[1] 28 Code of Fed. Regs. § 11.203; Form ISA-1, Item 4.

[2] For an account of the use of infamy as an official sanction against political and other dissent, see Mitchell Franklin, *The Encyclopédiste Origin and Meaning of the Fifth Amendment*, 15 Law. Guild Rev. 41 (1955). An early acount of the force of public opinion in the United States appears in De Tocqueville, Democracy in America (Bradley ed., 1945) vol. I, pp. 263-70.

In the first place, members of registered organizations become obvious and exposed candidates for criminal prosecution. Already the government has procured scores of indictments under the Smith Act for conspiracy and, except in isolated instances, obtained convictions. Recently the government has obtained indictments and convictions under the Smith Act for "knowing" membership in the Communist Party. Moreover any member of a registered organization would run a risk of prosecution under Section 4(a) of the Internal Security Act—a provision which makes it unlawful, subject to a prison sentence up to ten years—"to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship." And the danger of prosecution is greatly enhanced by Section 5 of the Communist Control Act of 1954, which establishes startlingly broad standards for proof of membership or participation in the Communist Party (68 Stat. 775).

Members of registered organizations become, in effect, publicly nominated for criminal prosecution under these or other laws. Their names are prominently displayed, their guilt has already been officially announced; the pressures for invoking criminal action are aroused and focused upon them. At least so most members could reasonably believe and fear.

Thus continued membership in a registered organization becomes an immediate hazard. Only resignation, or perhaps recantation, offers hope of salvation. New membership is unthinkable.

(c)

Registration also brings with it a further series of official deprivations. No member of a registered organization may, because of that membership alone, hold any non-elective government position (§ 5(a)). No member of a "Communist-action" organization may hold any employ-

ment, whether related to classified material or not, in any defense facility (§ 5(a)); members of "Communist-front" organizations must disclose such membership in applying for a job in a defense plant (§ (a)) and, under present security systems, would almost certainly be denied employment.[3] No members of a registered organization may apply for or use a passport (§ 6); he is thus denied the right to travel beyond the borders of the United States. If recently naturalized, he may be subject to denaturalization (§ 25); if an alien he is excludable, deportable and ineligible for naturalization (§§ 22, 25).

Moreover, registration exposes an individual to countless other Federal, state and local laws, regulations, restrictions and harassments directed against "subversive activities." Any person holding membership in a registered organization automatically becomes an obvious target—an easy mark—for one or more Federal, state or local investigating committees. He would almost certainly be barred from teaching in public schools or state universities. If drafted, he would be subject to ignominious disabilities. If a tenant in a Federally assisted housing project, he would, so long as the Gwinn Amendment stands, be subject to eviction. He would run serious risks of being denied admission to, or ousted from, a profession. In some states he would be denied unemployment compensation. In Indiana he could not become a professional boxer. And so on.

It is quite true that a member of an organization might be subjected to these restrictions and harassments even if the Act did not provide for registration. But registration intensifies and magnifies the whole process. It focuses public attention on the individual and makes application of the restrictions automatic, inevitable and overwhelming.

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[3] See, *e.g.*, Subversive Activities Control Act of 1950, Report of the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws to the Committee on the Judiciary, U. S. Senate, 84th Cong., 1st Sess. (1955) p. 5.

(d)

Nor would the difficulties confronting a member of a registered organization end with official sanctions. He would be equally subject to restrictions and pressures of private individuals and groups. Many an employer would refuse him a job. No work in the movie, radio, television industries, or in many industrial plants, would be open to him. Few, if any, private schools or universities would tolerate him. Many organizations would deny him admission or expel him. His social life in the community, and that of his wife and children, would be strained and tense, or worse.

It is quite true, here also, that these restrictions and pressures exist apart from the registration provisions. But again the registration provisions, with their brand of a scarlet letter would train an official spot-light upon individuals which would enormously increase their vulnerability. Or at least—and the result is the same—most persons would reasonably feel so.

(e)

Another serious source of danger to leaders and members, and prospective leaders and members, of organizations required to register grows out of the penalties imposed for failure to register, false registration, and the like. On their face these provisions may seem nothing more than routine enforcement measures. But taken in context they constitute a tangle of legal traps, ready to be sprung by zealous prosecuting officials.

The leadership of an organization compelled to register, for example, finds itself in a precarious position. If the organization, by a mere majority vote, decides not to register then the president, vice-president, treasurer and every member of the governing board become subject to a swift and relatively simple prosecution, culminating in prison terms up to five years for each day the failure to

register continues.[4] If the organization decides to register then the above officers must furnish within thirty days after final order, and annually thereafter, elaborate, detailed and exact information on every sum received and expended by the organization for the past year, all evidences of debt, and an account of all liabilities.[5] A "Communist-action" organization must furnish a complete list of all members during the preceding year with their addresses and aliases (§ 7(d)). Every organization must also "make and keep current all bookkeeping and other financial records relating to registrant's activities, including cancelled checks, bank statements, and records of income and disbursements, showing names and addresses of all persons who have paid moneys to the registrant or who have received moneys from the registrant, the specific amounts so paid or received, the date on which each item was paid or received and the purpose for which any item was expended."[6] A "Communist-action" organization must in addition "make and keep current such books and records as will disclose the names and addresses of the members of the registrant, the officers and employees of the registrant, and the names and addresses of persons, other than members, officers or employees, who actively participate in the activities of the registrant."[7]

The registration forms provided by the Department of Justice give prominent display to the Federal statute which provides up to five years' imprisonment for anyone who "knowingly and wilfully falsifies, conceals or covers up * * * a material fact, ~~or makes any~~ false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any

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[4] Internal Security Act, § 7(b); 28 Code of Fed. Regs. § 11.205.

[5] Form ISA-1, Instruction 6 and Items 4-10.

[6] 28 Code of Fed. Regs. § 11.204(a).

[7] 28 Code of Fed. Regs. § 204(b).

false, fictitious or fraudulent statement or entry." [8] Voluntary associations in the political field, possibly with the exception of the Communist Party, notoriously operate in a loose and amateurish fashion. The probability of discovering mistakes in the elaborate data required to be filed or kept is high. True, the statutes punish only "knowing" or "willful" errors. But these terms are broadly construed by the courts and in any event present an issue for the jury, very likely an unfriendly one. Nor can the leadership of a registered organization count upon forbearance or mercy from the Department of Justice.[9] As a result, the leadership finds itself extremely vulnerable to criminal prosecution with cumulative penalties. Faced with such possibilities it takes a most courageous or indifferent person to assume responsibility for the leadership of any organization which might at some time be faced with an order to register.

Similar dangers face persons who are or contemplate becoming members of organizations likely to be compelled to register. Every member of a "Communist-action" organization is liable to cumulative penalties if he fails to register individually after the organization itself refuses to register or does not register his name (§ 8). Since it is most unlikely the Communist Party would register, this provision subjects all its members to an immediate prosecution in which the only issue would be the question of membership. Such procedure enables the government to avoid the long trials which have characterized Smith Act prosecutions and to conduct prosecutions of alleged Communist Party members on a mass production basis. When one takes into account the hopelessly broad and vague standards of Section 5 of the Communist Control Act, detailing the type of evidence upon which a jury may find

[8] 18 U.S.C. § 1001, reprinted on Form ISA-1. See also Internal Security Act § 15(b).

[9] Note, for example, the five unsuccessful proceedings against Harry Bridges, the abortive prosecution of Owen Lattimore, and the groundless indictment of Val Lorwin.

Communist Party membership, the risks to any member of a registered organization become apparent.

(f)

The registration provisions of the Internal Security Act impinge not only upon the leadership and members of organizations subject, or possibly subject, to the Act, but also upon all relations of the organization with the community in which it attempts to function. As already stated, a registered organization must file an itemized account of all funds received, including the date, the source from whom received, and the amount; a list of all payments, to whom each was made, the amount, and the purpose for which it was made; and a statement of all evidences of debt and all liabilities. This information must be kept up to date by annual reports. It is open to public inspection at the Department of Justice. In addition, books and records must be kept, including the names and addresses of all persons "who actively participate" in the activities of a "Communist-action" organization. These are available to the Department of Justice, legislative investigating committees, or any public authority with subpoena power.

The result is that every action of a registered organization involving a financial transaction—in effect most important actions it takes—is revealed to a hostile press and public. The name of every individual or group contributing financial support, or having any financial dealing, is mercilessly exposed to all the public and private pressures that generate around unpopular causes. In addition, every person who can be said to "actively participate" in the affairs of a "Communist-action" organization finds his conduct recorded for inspection by every governmental authority with subpoena power. These facts should be considered particularly in the light of the vague provisions of Section 4(a), subjecting to criminal prosecution any person who "substantially contributes" to the establishment

of a totalitarian dictatorship, and of Section 5 of the Communist Control Act, establishing criteria for proof of "membership" or "participation" in the Communist Party.

Under such circumstances, no matter what the leadership and members did, a registered organization would find itself effectively throttled. Financial support would be largely cut off. Meeting places would be hard to find. Speakers would be reluctant to appear. Even business dealings—such as obtaining the services of a printer—would be seriously curtailed. No political organization could function under such conditions. Inevitably it would find itself isolated and impotent.

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From all the above our only conclusion can be that the registration provisions of the Internal Security Act, though ostensibly framed as a simple disclosure regulation, operate in practice to destroy, or at the least permanently and hopelessly cripple, any organization compelled to register. The government's argument that they constitute mere disclosure of information, similar to lobbying or newspaper registration, must be regarded as disingenuous.

**2. The registration provisions are designed and operate to eliminate the normal and legitimate activities carried on by organizations compelled to register.**

The second basic feature of the registration provisions of the Internal Security Act is that they are primarily designed and operate to suppress, not illegitimate political activity, but the normal and legitimate activity customarily carried on by political associations.

It is necessary at this point to indicate briefly what we mean by "illegitimate" and "legitimate" political activity. We are concerned with methods for achieving political goals, not with the goals themselves. Certain methods, or types of activity, are clearly illegitimate as contrary to the

basic principles of the democratic process. Such activity includes treason, sabotage, espionage, creating insubordination in the armed forces, corruption of public officials, the use of force and violence, and similar conduct. In view of *U. S.* v. *Dennis*, 341 U. S. 494, we may add, though we disagree, advocacy of force and violence. On the other hand certain types of activity, which may be carried on by the same organization as engages in illegitimate activity, are clearly recognized as legitimate and proper within the democratic framework. Such activity includes all the normal operations of a political association in attempting to persuade by peaceful means a majority of the community to its point of view. At times the dividing line between legitimate and illegitimate activity may be unclear or debatable. With that we are not concerned at this point. The important fact is that the two types of activity are broadly distinguishable and may be carried on by the same organization.

The Communist Party, alleged to be a "Communist-action" organization, has been charged in Section 2 of the Act and elsewhere with engaging in certain illegitimate activity, principally advocacy of the use of force and violence. We are not concerned here with the validity of that charge and, for the purposes of our argument, it may be admitted. So far as appears from Section 2 and other sources it is not asserted that "Communist-front" organizations engage, or at least normally so, in any form of illegitimate activity. Be that as it may, the fact is clear from the record, and is not open to dispute, that organizations subject to the Act do engage in substantial and important legitimate activity. They hold meetings, write and distribute pamphlets, attempt to buttonhole legislators, and pursue a thousand other activities of the kind that is characteristic of voluntary associations in a democratic society.

The registration provisions operate to suppress this legitimate political activity. Moreover, that suppression is not merely an incidental effect of an effort to eliminate illegitimate activity, but rather is the direct and primary objective of the legislation.

(a)

In the first place, as just pointed out, the Act operates to destroy, or hopelessly cripple, any organization compelled to register. The effect is not to punish, or eliminate, some specific illegitimate activity—indeed the "Communist-front" organizations are not even charged with such activity—but to end the life of the organization altogether or to reduce it to impotence. Thus, as the Act goes into operation, a large and significant sector of political activity, carried on by perfectly legitimate methods, is wiped out.

(b)

Equally important, registration is required of an organization, not upon a showing that it has engaged in any form of illegitimate activity, but under standards which are fully applicable to an organization engaging only in wholly legitimate activity.

An organization must register as a "Communist-action" organization if the Board finds that the organization is (1) "substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement"; and (2) "operates primarily to advance the objectives of such world Communist movement" (§ 3(3)). Plainly direction, domination or control of an organization by a foreign government or foreign organization does not mean that the organization is engaging in illegitimate activity. It may or it may not be, depending upon what it does. But surely much legitimate activity is carried on in the United States under the direction, domination or control of foreign governments and foreign organizations.[10]

[10] The significance of "foreign control" as a ground for suppressing what is otherwise legitimate political activity is a question discussed *infra*, p. 39.

As to the second half of the standard—advancing the objectives of the world Communist movement—Section 2 asserts that such objectives are "to establish a Communist totalitarian dictatorship in the countries throughout the world" (§ 2(1)). Plainly this could be done by wholly legitimate methods.

It is true that Section 2 also asserts that the objectives of the world Communist movement are to be attained "by treachery, deceit, infiltration into other groups * * *, espionage, sabotage, terrorism, and any other means deemed necessary" (§ 2(1)). But these are explicitly designated as means, not objectives; not all of them (e.g. deceit and infiltration) are necessarily illegitimate activity; and it is recognized, by adding "and other means", that the objectives are sought by legitimate as well as illegitimate activity.

From all this it is plain that an organization can be ordered to register as a "Communist-action" organization without any proof whatever that it has engaged in any form of illegitimate activity.

This conclusion is confirmed by an analysis of Section 13(e). In this subsection the framers of the Act set forth eight categories of evidence the Board shall take into consideration in determining whether an organization is a "Communist-action" organization. The eight categories, while not designated as exclusive, were certainly intended to be the principal grounds, and sufficient by themselves, for such a finding. There is no reference in these eight categories to the use of force or violence, espionage, sabotage or similar illegitimate conduct. None of them contain even a suggestion that such illegitimate activity must be found before registration can be compelled.

What has just been said of "Communist-action" organizations is *a fortiori* true of "Communist front" organizations. The Act defines a "Communist-front" organization as one which is (1) "substantially directed, dominated, or controlled by a Communist-action organization," and (2) "pri-

marily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement" (§ 3(4)). Under this standard an organization could be found to be a "Communist-front" without any showing that it had engaged in any illegitimate activity. Nor does Section 13(f)—which lists four categories of evidence which the Board shall consider in finding an organization to be a "Communist-front"—contain anything which requires a finding of such activity.

(c)

The application of the registration provisions by the Subversive Activities Control Board and the Court of Appeals in this case confirms the fact that the existence of illegitimate political activity is not a prerequisite to ordering an organization to register, even as a "Communist-action" organization. The Board first finds, substantially in the terms of the Act, that the objectives of the world Communist movement are "the establishment of Communist dictatorships of the proletariat in all countries throughout the world" (Bd. Rep't., p. 9). But it expressly states that these objectives are sought "by any means whether legal or illegal" (Bd. Rep't., p. 6); thus acknowledging that legal methods to obtain the objectives are or may be employed.

The remaining findings of the Board—set forth in great detail—are not primarily concerned with whether the Communist Party has or has not used "illegal means", or, in our terminology, engaged in illegitimate political activity. The findings, grouped under the eight categories of Section 13(e), are directed towards establishing foreign control and advancement of the world Communist movement, irrespective of whether the methods are legitimate or illegitimate. References are made to the advocacy of force and violence, to false swearing, and to other illegitimate conduct. But these are subordinate factors in the result. In essence, the Board finds that the Communist Party is a "Communist-action" organization and orders it to register,

not because it has engaged in specified illegitimate activity, but because it finds the Communist Party to be under foreign control and operated generally to advance the world Communist movement.

The Court of Appeals treats the issue in the same fashion (Op. 11-12, 39, 41-42, 56-57, 60-61).

(d)

Further proof that the registration provisions are designed to prevent normal and legitimate political activity appears from an examination of the disabilities imposed by the Act upon registered organizations. These sanctions are applicable to any activity of the organization, quite apart from its character as legitimate or illegitimate. Thus under the labelling provision, all mail disseminated by a registered organization must be marked on the outside with the Communist label, and any radio program so designated, regardless of whether it contains seditious or other illegitimate material. All communication is swept under the ban. Similarly all employment in defense plants is denied and all passports refused.

(e)

Finally, it should be emphasized that suppression of legitimate political activity is not merely incidental to, or a necessary part of, the suppression of illegitimate conduct. Quite the contrary, the elimination of legitimate political activity is the primary purpose of the registration provisions.

For the punishment and control of all serious forms of illegitimate activity adequate laws existed prior to the passage of the Internal Security Act. Treason, espionage, sabotage, insurrection, the use of force and violence, or conspiracy to commit any of them, were all subject to severe criminal penalties. Even advocacy of force and violence, and conspiracy so to advocate, were punishable

under the Smith Act. These laws were all enforceable and enforced. They provided protection against all major forms of illegitimate political conduct. If any gaps existed they could readily have been filled by specific legislation. For such purposes the registration provisions were unnecessary.[11]

Furthermore, a system of registration is hardly an effective or appropriate method for dealing with espionage, sabotage, the use of force and violence, or the like. Apart from questions of self-incrimination, the device of registration is wholly unsuitable for coping with such conduct. Congress could scarcely have thought that it was. The object of the registration provisions was to get at conduct not subject to existing law. It was directed toward suppressing those activities of organizations found to be supporting the world Communist movement which were carried on through traditional and legitimate methods of peaceful political action.

**3. The impact of the registration provisions carries far beyond the Communist Party and its immediate environs: it seriously restricts freedom of expression throughout the whole liberal movement and indeed the entire population.**

Up to this point we have discussed the registration provisions primarily as they apply directly to organizations ordered to register. But it is even more important to consider the impact of these provisions as they affect the whole liberal movement and, beyond that, the entire population. Even the briefest analysis makes clear that the registration provisions gravely impair the essential rights of free association and free expression throughout the country. Many of the factors here have already been pointed out, but certain matters should be emphasized.

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[11] For a summary of the applicable legislation see Thomas I. Emerson and David Helfeld, *Loyalty Among Government Employees*, 58 YALE L. J. 1, 27-8 (1948); Arthur E. Sutherland, Jr., *Freedom and Internal Security*, 64 HARV. L. REV. 383, 386-8 (1951).

In the first place, the standards as to what constitutes a "Communist-front" organization—both in Sections 3(3) and 13(f)—are so broad that any association or individual dealing with problems with which the Communist Party is also concerned, and not differing sharply from the Communist Party position on that problem, operates under the shadow of the Act and has reason to fear its possible application. "Direction, domination or control" by the Communist Party can be spelled out of the active participation in an organization of a relatively few individuals whose affiliations and views are not known to the members, or whose views differ on other issues than those which the organization is formed to promote. Or it may be inferred from the absence of difference between the Communist Party position and that of the organization on those matters with which the organization is concerned. The standard of "primarily operated to give aid and support" to the world Communist movement embraces almost any action which conforms to the current Communist Party position, or supports the constitutional rights of the Communist Party, or even is opposed to the orthodox government position on such matters as the recognition of Communist China. Indeed, an organization may find itself in trouble by advocating the same position that the government supports, as for example, in upholding the rights of Negroes and other non-political minorities.[12] These standards, moreover, are applied under the relaxed rules of the administrative process, with only limited judicial review.

The impact of the broad standards is accentuated by the severity of the sanctions imposed. The dreadful effect upon a citizen of being officially branded as disloyal and a traitor, the disabilities imposed upon members of registered organizations, the dangers of being trapped in the criminal enforcement machinery, all operate to deter individuals from relations with associations dealing in con-

[12] See, *e.g.*, Board Report, p. 77, quoted *infra*.

troversial matters. Likewise, the effect of the Act in exposing individuals to the fierce public and private pressures that have marked our political life for the past decade drastically discourges both freedom of association and individual expression.

The result is that few individuals will care to run the risks involved in participating in controversial issues from a point of view opposed to government policy or consistent with a specific objective also endorsed by the Communist Party.

In the same way voluntary associations engaging in political activity—without which an individual citizen cannot hope to function effectively, and without which a democratic society cannot hope to maintain itself—are badgered, hampered and perhaps even destroyed. Leaders, particularly leaders of moderate temperament, will be hard to find. Individuals will fear to take the risk of joining unless they know all the other members, agree with every policy, and know in advance what action the association will take. Members will be forever suspicious of other members. The association itself must carry on a continuous investigation of all its members and conduct constant purges of left-wing elements. It must weigh every action or policy in the light of possible accusations sure to arise if other organizations adopt a similar policy on the same issue. If an association is even charged by the Department of Justice with being a "Communist-front" organization it will immediately lose all influence and probably soon disintegrate. If an association is ordered to register and dissolves it will be a long time before other members and leaders will be bold enough to form another organization in the same field.

The impact of the registration provisions on the right of association is vividly illustrated by an article in the conservative *U. S. News and World Report*, published at the

time of passage of the Act, giving the following advice to its readers:

"If in Doubt, Don't Join!

"For the person who wants to keep out of trouble in the future, this appears to be good advice:

"Be very careful about organizations joined. Avoid membership in anything that might turn out to be labeled a 'Communist-front' or a 'Communist-dominated' organization. Be equally careful about contributing to organizations. Make sure that any organization getting money from you may not have any possibility of a Communist tie.

"Watch out that your name is not on the list of sponsors of an organization not well known to you. It may even be important to make sure that your name is not on the mailing list of any organization that could turn out to be Communist controlled. The American habit of joining organizations needs now to be restrained." (U. S. News and World Report, September 22, 1950, p. 20.)

It may be suggested that the picture we have given is overdrawn and that administration of the Act will not be pressed to the point here indicated. But experience with similar legislation points the other way. There are forces in the administration of any law of this kind—the need to arouse public opinion, the vested interests and ambitions in the machinery of prosecution, the political pressures engendered—which tend irresistibly to push such legislation to its outermost limits. Furthermore, it is not even necessary that the dangers be real; it is enough that they are felt so.[13]

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[13] For an excellent description of the dangers to freedom of expression growing out of the registration provisions, see Zechariah Chafee, Jr., *The Registration of "Communist-Front" Organizations in the Mundt-Nixon Bill*, 63 Harv. L. Rev. 1382 (1950). See also President Truman's message vetoing the bill which, as passed over his veto, became the Internal Security Act, 96 Cong. Rec. 15629-32; Note, *The Internal Security Act of 1950*, 51 Col. L. Rev. 606, 607 (1951).

Mr. Justice Frankfurter, referring to the conviction of the Communist Party leaders under the Smith Act, observed:

> "* * * it is self-delusion to think that we can punish them for their advocacy without adding to the risks run by loyal citizens who honestly believe in some of the reforms these defendants advance. It is a sobering fact that in sustaining the conviction before us we can hardly escape restriction on the interchange of ideas." (*Dennis* v. *U. S.*, 341 U. S. 494, 549.)

What is true of the Smith Act is immeasurably more significant in the Act now before the Court. This aspect of the Act's operation entails the gravest consequences of all. The present case technically involves only the Communist Party. Actually it reaches to the roots of the democratic process.

**B. It is not within the power of government under the first amendment to prohibit a political association from engaging in the normal and legitimate forms of political activity. This is true even though such association engages in other activities that are illegitimate, or even though such association is controlled by an organization that engages in illegitimate activity.**

The first constitutional issue that emerges from our analysis is a clear-cut and basic one. We have seen that the registration provisions, far from merely requiring the disclosure of information, would in practice operate to destroy or seriously cripple any organization ordered to register. We have also seen that the effect, and in fact the purpose, of these provisions is to eliminate all the normal and legitimate political activities of these organizations. The legislation is particularly crucial because of the effect it would have upon freedom of expression generally.

The issue presented to the Court, therefore, is this: Does the government have power, in view of the First Amendment's prohibition against infringement of freedom of political expression, to adopt measures which prevent a political association from engaging in all the usual types of political activity? Does such power arise from the fact that the organization is tainted with other, illegitimate, activity, or is controlled by a tainted organization?

**1. On its face the Act compels registration regardless of whether the organization has engaged in any illegitimate activity whatsoever, or is controlled by an organization that does. Such a requirement plainly violates the First Amendment.**

Nothing in the standards laid down by the Act for ordering registration requires a finding that the organization has engaged in any illegitimate activity, or is controlled by an organization that does. The objective of establishing a totalitarian dictatorship does not, as we discuss in more detail later, make all activity directed to that end illegitimate. Similarly, as we also discuss later, direction of an organization from abroad does not necessarily make all its activities illegitimate. Hence the requirement of registration can be imposed upon an organization whose only activity has been entirely within the framework of democratic procedures. This is strikingly true of organizations which may be found to be "Communist-front" organizations.

It should be emphasized, also, that the restraints imposed by the registration provisions do not relate only to one aspect of a political association's activities, such as its use of campaign funds. They operate to suppress *all* political activity, in any form, by the organization.

On their face, therefore, the registration provisions simply prohibit normal political activity. The sweep of these provisions is so broad, and their effect upon free expression so devastating, that the legislation must be declared on its face squarely in conflict with the First Amendment.

**2. Even if we assume that an organization required to register must be shown to have engaged in illegitimate activity, or to be controlled by another that does, it is still clear that the government cannot prevent that organization from engaging in legitimate activity.**

Although the Act itself does not require a showing of illegitimate activity, the arguments in support of the registration provisions rest upon the ground that this element is present. Consequently we will assume, for purposes of argument, that the Communist Party is engaging in certain forms of illegitimate political action, principally advocacy of the use of force and violence. We will assume, also, that certain other organizations are "directed, dominated or controlled" by the Communist Party in the narrowest sense of those terms.

Taking these assumptions, it remains clear that the government cannot, in spite of the illegitimate activity, prohibit those activities of a political association which are normal and legitimate. This principle, which is implicit in democratic theory and essential in democratic practice, has been fully accepted and applied by this Court in prior cases.

The leading case is *DeJonge* v. *Oregon*, 299 U. S. 353. DeJonge was indicted and convicted for violation of the Oregon Criminal Syndicalism Law. This statute defined criminal syndicalism as "the doctrine which advocates crime, physical violence, sabotage or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution." It went on to proscribe a series of offenses, including the advocating or teaching of criminal syndicalism, and presiding at or assisting in conducting any meeting of a group which advocated or taught the doctrine. Specifically, DeJonge was charged with assisting in the conduct of a meeting called by the Communist Party, alleged to be an organization advocating criminal syndicalism.

The meeting in question was a public one, conducted in an orderly manner. Its announced purpose was to protect against the conduct of the police in a local strike then in progress. Speeches were made on this and similar subjects. There was no advocacy or teaching of criminal syndicalism.

On the other hand, the meeting was called, organized and conducted by the Communist Party. The Court assumed, for purposes of the case, that the Communist Party was an organization that taught and advocated criminal syndicalism in violation of the Oregon statute. The first speaker "dwelt on the activities of the Young Communist League." DeJonge, the second speaker, was a member of the Communist Party "and went to the meeting to speak in its name." Communist literature, not advocating force or violence, was distributed at the meeting. DeJonge urged the purchase of this literature and also "asked those present to do more work in obtaining members for the Communist Party." (299 U. S. at 359.)

The case thus presented the precise issue with which we are here concerned: Could the state validly prevent the Communist Party, which was guilty of advocating "crime, physical violence, sabotage or [other] unlawful acts or methods," from engaging in the normal political activity of holding an orderly meeting on an issue of public importance? This Court unanimously held not, and reversed the conviction of DeJonge.

Chief Justice Hughes, in a memorable opinion, laid down the doctrine in the plainest terms. Referring to the rights guaranteed by the First Amendment, he said:

> "These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. *But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must*

*not be curtailed.* The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press, and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government." (299 U. S. at 364-365; italics added.)

Speaking of the particular right there at issue—freedom of assembly—Chief Justice Hughes went on:

"It follows from these considerations that, consistently with the Federal constitution, peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceful assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge." (299 U. S. at 365.)

It is true that the statute in the *DeJonge* case proscribed legitimate political activity by direct criminal sanctions. But it will hardly be suggested that the same repression can be lawfully accomplished by any other state sanction. As Chief Justice Vinson said in *American Communications Association* v. *Douds*:

> "We have been reminded that 'It is not often in this country that we now meet with direct and candid efforts to stop speaking or publication as such. Modern inroads on these rights come from associating the speaking with some other factor which the state may regulate so as to bring the whole within official control." (339 U. S. 382, 399, quoting Justice Jackson concurring in *Thomas* v. *Collins*, 323 U. S. 516, 547.)

And later Chief Justice Vinson added, in words peculiarly applicable to this case:

> "But as we have noted, the fact that no direct restraint or punishment is imposed upon speech or assembly does not determine the free speech question. Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes. A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature." (339 U. S. at 402.)

No other case in this Court, so far as we are aware, has raised the issue as precisely as the *DeJonge* case. But in numerous other decisions this Court has taken particular pains to enforce the First Amendment's protection of legitimate political activity in situations where other activity was involved which was illegitimate and not subject to constitutional protection.

Thus in *Herndon* v. *Lowry*, 301 U. S. 242, Herndon was convicted under a Georgia insurrection statute which prohibited "any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State." The evidence showed that Herndon, a Communist Party organizer, had procured members for the Communist Party in Atlanta, and that he had in his possession Communist literature which stated that the Communist Party was based "upon the revolutionary theory of Marxism," referred to the need for "overthrow of * * *

class rule in the Black Belt" as necessary for the "self-determination" of the Negroes, and contained similar references to the "revolutionary struggle for power." The Supreme Court reversed the conviction, Justice Roberts saying:

> "We are of opinion that the requisite proof is lacking * * *. His membership in the Communist Party and his solicitation of a few members wholly fails to establish an attempt to incite others to insurrection. Indeed, so far as appears, he had but a single copy of the booklet the State claims to be objectionable; that copy he retained. The same may be said with respect to the other books and pamphlets; some of them of more innocent purport. In these circumstances, to make membership in the party and solicitation of members for that party a criminal offense, punishable by death, in the discretion of the jury, is an unwarranted invasion of the right of freedom of speech." (301 U. S. at 259, 261.)

Other cases in which this Court has protected legitimate political activity, carefully separating it from illegitimate activity, include *Stromberg* v. *California*, 283 U. S. 359; *Schneider* v. *State*, 308 U. S. 147; *Hague* v. *C. I. O.*, 307 U. S. 496; *Thornhill* v. *Alabama*, 310 U. S. 88; *Taylor* v. *Mississippi*, 319 U. S. 583; *Schneiderman* v. *U. S.*, 320 U. S. 118; *Thomas* v. *Collins*, 323 U. S. 516; and *Kunz* v. *New York*, 340 U. S. 290. Compare *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, with *Donaldson* v. *Read Magazine*, 333 U. S. 178, and *Summerfield* v. *Sunshine Book Co.*, 221 F. 2d 42 (D. C. Cir.) cert. den. 349 U. S. 921.

All of these cases involved infringement of the right to engage in one particular form of legitimate political activity. The present case *a fortiori*, involves curtailment of the right to engage in all forms of legitimate activity.

In *American Communications Association* v. *Douds*, 339 U. S. 382, the Court took occasion to reaffirm the doctrine of the *DeJonge* case. The *Douds* case involved the validity

of the non-Communist affidavit of the Taft-Hartley Act and the Court, by a narrow margin, upheld that particular restriction upon Communist Party membership. But even the majority was careful to point out—and the implication was clear that otherwise its decision would have been different—that the provision did not prevent all other forms of legitimate activity by the Communist Party. Chief Justice Vinson wrote:

> "Section 9(h) touches only a relative handful of persons, leaving the great majority of persons of the identified affiliations and beliefs completely free from restraint. And it leaves those few who are affected free to maintain their affiliations and beliefs subject only to possible loss of positions which Congress has concluded are being abused to the injury of the public by members of the described group." (339 U. S. at 404.)

And Chief Justice Vinson later, pointing out the "crucial" fact that "the sole effect of the statute upon one who believes in overthrow of the Government by force and violence * * * is that he may be forced to relinquish his position as a union leader" (339 U. S. at 408), expressly adopted as an "apt statement of that principle" the words of Justice Jackson's concurring opinion:

> "The Act does not suppress or outlaw the Communist Party, nor prohibit it or its members from engaging in any aboveboard activity normal in party struggles under our political system. It may continue to nominate candidiates, hold meetings, conduct campaigns and issue propaganda, just as other parties may. No individual is forbidden to be or to become a philosophical Communist or a full-fledged member of the Party. No one is penalized for writing or speaking in favor of the Party or its philosophy. Also, the Act does not require or forbid anything whatever to any person merely because he is a member of, or affiliated with, the Communist Party. It applies only to one who becomes an officer of a labor union." (339 U. S. at 408, 434).

The registration provisions, of course, do precisely what the Court held it was "crucial" that the Taft-Hartley Act did not do.

It should be particularly noted that the principle of the *DeJonge* case does not rest upon any application of the clear and present danger test. The Court in the *DeJonge* case did not rely upon or even mention that test. Nor was it invoked in this connection in the *Herndon* case. The reason is that any consequences arising from the legitimate activity repressed here, as in the *DeJonge* case—the holding of peaceful meetings, the support of candidates in elections, the issuance of leaflets and books containing normal political discussion—cannot be "an evil that Congress has a right to prevent." If such normal political conduct could be considered as giving rise to an "evil," then there would be no meaning left to the First Amendment. Consequently the findings of Congress, the Board and the lower court with respect to clear and present danger are wholly irrelevant to the issue now before the Court. For that reason we do not attempt to discuss clear and present danger or undertake to distinguish the *Dennis* case on this point.

*A fortiori*, any test of "reasonableness," as employed in the lower court and urged by the government here, is inapplicable under the *DeJonge* rule. Surely Congress cannot restrict or suppress all the basic rights of lawful political expression on the part of any group under a theory that the restrictions are "reasonable".

Finally, it should be added that the principle of the *DeJonge* case is compelled by the fundamental theory of the First Amendment and is essential to the effective realization of that theory in a practical democracy.

In broad terms the question, as presented to the Court under the assumptions we are now making, is whether First Amendment freedoms must be extended to groups whose ultimate aims or some of whose immediate methods are antidemocratic. The answer in democratic theory is that they

must. It is true that Milton, the first to expound the modern theory of free speech, would have withheld its benefits from Roman Catholics.[14] But that qualification has been abandoned by most later advocates of the doctrine. A classic statement of the prevailing view is that of Justice Holmes:

> "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." *Gitlow v. N. Y.*, 268 U. S. 652, 673.

The reasoning is that everyone in a democratic community should have equal rights to persuade others to his view, so long as he stays within the framework of democratic procedures. This does not prevent punishment of conduct in violation of that process; but it does require everyone to have access to those procedures. Only thus can a democratic society function and retain its vitality. All in such a society have a right to speak and a right to hear all points of view. The radical views of those who feel and act militantly are as important as the moderate views of those who would preserve the status quo. The suppression of any point of view not only hinders peaceful social change but gives no outlet to the militant group other than attempted violent destruction of the society which seeks to curb it.

Extension of the right of free expression to anti-democratic groups is likewise essential from a practical point of view. After all, who is to decide whether a particular group is anti-democratic or not? How are we to be sure the label will not be applied to all groups considered radical—Socialists, economic planners, and others? There are always strong pressures in a political community to carry such restrictions far beyond any original intention. They become weapons in a partisan political struggle, too readily

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[14] John Milton, *Areopagitica* (Everyman's Library, 1927), p. 38.

and too often invoked, and ultimately the rights of all minorities are in jeopardy.

Suppression of the right of any group to freedom of expression cannot fail to exert an unhealthy effect upon the operation of a democratic community. It undermines the moral strength of what should be held as a fundamental principle and reduces that principle to a rule of political manipulation. By a kind of Gresham's law, it drives out of circulation real freedom of expression and lessens its value to all.

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The application of the *DeJonge* principle to the case at bar cannot admit of doubt. The fact that the Communist Party may advocate the use of force and violence, or engage in other illegitimate activity, cannot provide grounds for requiring it to register, thereby repressing "peaceable assembly and a lawful public discussion," or other legitimate activity. As to "Communist-front" organizations their only connection with illegitimate conduct is that they are found to be "substantially directed, dominated or controlled" by the Communist Party. *A fortiori*, they cannot under the *DeJonge* rule be driven by government restrictions to impotence or collapse.

**3. The justifications for the registration provisions advanced in the Internal Security Act and by the government in argument here are wholly inadequate as reasons for not following the foregoing principles in this case.**

There remains only to consider, briefly, whether certain justifications advanced in support of the Act give any reason for not applying the accepted rule in this case.

So far as appears, the framers of the Act had in mind two major reasons for attempting to suppress the legitimate activities of "Communist-action" and "Communist-front" organizations. Both are embodied in the definitions or standards of Section 3(3) and 3(4). One is that these

organizations operate to "advance the objectives" of, or give "aid and support" to, the world Communist movement. The other is that "Communist-action" organizations are "substantially directed, dominated or controlled" by a foreign government or organization, and "Communist-front" organizations are "substantially directed, dominated or controlled" by a "Communist-action" organization. We will discuss these in turn.

**(a) Advancing the Objectives of the World Communist Movement**

The objective of the world Communist movement, according to Section 2 of the Act, is the establishment of totalitarian dictatorships in various countries of the world, including the United States. To the extent that this objective is pursued through peaceful and democratic means—that is, by legitimate political activity—such action is protected by the First Amendment from government interference. This is simply one aspect of the proposition, already discussed, that rights under the First Amendment must be extended to anti-democratic groups.

The government is properly concerned with *methods* of political action. Thus, it has power to prevent any person from employing anti-democratic methods to obtain political goals. But it has no power to restrict political activities merely because they are directed toward achieving certain forms of political organization, however abhorrent. It cannot interfere with persons seeking to establish, by democratic methods, a form of government that is parliamentarian, socialist, communist, fascist or any other—democratic or not.

Hence the fact that organizations are "advancing the objectives" of, or giving "aid and support" to, the world Communist movement cannot be a justification for suppressing the legitimate activities of these organizations.

### (b) Foreign Control

We need not attempt to decide under what circumstances, if any, the existence of "foreign control" might empower the government to impose upon political expression restrictions which would otherwise be prohibited by the First Amendment. For it is clear, we submit, that the kind of "foreign control" envisaged by the Internal Security Act and found by the Board in this case cannot operate to change the *DeJonge* rule or justify suppression of all normal political activities.

The Act employs the terms "directed, dominated or controlled," and the Board couches its findings in the same language; but it is essential to consider carefully how those terms are used and how they are being applied. The character of the "foreign control" which stamps an organization as a "Communist-action" group becomes apparent from an examination of the standards embodied in Section 13(e). These authorize the Board to rely on such matters as the extent to which the activities of an alleged "Communist-action" organization are performed "to effectuate the policies" of a foreign government; the extent to which its views "do not deviate from those of such foreign government"; the extent to which it sends "representatives to any foreign country for instruction or training in the principles, policies, strategy, or tactics" of the world Communist movement; and the extent to which it "reports" to a foreign government. . . .

Similarly the Board in reaching its finding of "direction, domination and control" relied upon such matters as that "a substantial number of Respondent's present leaders * * * have been to the Soviet Union on numerous occasions on Party business and have been indoctrinated and trained in the Soviet Union on Russian strategy and policies" (Bd. Rep't, p. 20); that "among the major activities of Respondent are teaching, advocacy, and agitation in opposition to what Respondent calls United States imperialism" (Bd.

Rep't, p. 44); that "the *Daily Worker* is the counterpart in the United States of the Soviet Union organ *Pravda*" (Bd. Rep't, p. 61); that "Respondent has campaigned for and championed reforms such as shorter working hours, non-militarization of youth and Negro rights" (Bd. Rep't, p. 77); that Respondent exchanged "greetings" with other Communist parties (Bd. Rep't, pp. 95-98); and that the "use of Party names or aliases for the purpose of concealing membership and activities in the CPUSA has been a widespread and continuous practice" (Bd. Rep't, p. 109). Scores of similar findings form an integral part of the Board's conclusion. It is to be noted, however, that the Board found no evidence of financial support from abroad since 1940, except the receipt of some book plates and English translations from International Publishers (Bd. Rep't, p. 88).

Of course, the degree of "foreign control" exercised over a "Communist-front" organization—where the "control" operates indirectly through a "Communist-action" organization—is even more remote and unsubstantial.

To say that by reason of "foreign control" of such a character a domestic organization can be prevented from engaging in legitimate political activity would strike at the heart of the First Amendment. Such a doctrine would give the government power to curb the legitimate activity of almost any organization with international affiliations. For most such organizations have relations with foreign counterparts and attempt to carry out policies determined at the international level. It would authorize government control even over organizations formed to support the United Nations or its subsidiary groups. It would furnish the basis for state power over religious organizations with international affiliations, such as the Roman Catholic Church and the Zionist organizations whose rights also depend upon the First Amendment. It would apply in other areas—to scientific, cultural, recreational and vocational groups—thus in effect authorizing the repression of

any free expression and association on an international scale. And it would endanger organizations with no international affiliation of their own but which were influenced by or worked together with groups having an international character.

Surely the protection of the First Amendment cannot be so limited. To do so would be especially unfortunate at a time when relations between international groups are crucial to a solution of the grave problems that confront the world.

The fact is that any reason for interfering with First Amendment rights of organizations under "foreign control" is completely absent in the case of voluntary associations operating within the United States. Such associations are masters of their own decisions. Neither they nor their members are subject to any physical or police control from abroad. The organization operates under American laws, in an American environment, subject to everyday American customs, ideas and traditions and it must secure the approval of American public opinion. Apart from financial contributions—a special issue, but not one involved here—the kind of "control" exercised by a foreign government or organization is ideological in character. The American association or individual can always withdraw. What is designated by the Act as "control", therefore, is in reality little more than ideological influence. Again, this is particularly true of so-called "Communist-front" organizations.

For these reasons, we submit, the argument based on "foreign control" cannot alter or qualify the principle of the First Amendment that political associations cannot be refused the right to engage in legitimate activity.

**C. The registration provisions are invalid under the First Amendment because they are not narrowly drawn to meet the problem Congress ostensibly undertook to solve.**

Even if we assume the power of Congress to compel the Communist Party and organizations under its control to register with the Department of Justice, the Act in its present form is invalid as not being narrowly drawn to meet the specific abuses Congress purported to correct. It is well-settled law that legislation impinging upon rights protected by the First Amendment must be narrowly framed to meet the specific abuse and must not "sweep within its orbit" a mass of other matters with which the Congress has no power to concern itself. *Lovell* v. *Griffin*, 303 U. S. 444; *Schneider* v. *State*, 308 U. S. 147; *Thornhill* v. *Alabama*, 310 U. S. 88; *Cantwell* v. *Connecticut*, 310 U. S. 296; *U. S.* v. *C. I. O.*, 335 U. S. 106; *Burstyn* v. *Wilson*, 343 U. S. 495.

The principle is vital to the maintenance of the protections afforded by the First Amendment. Citizens in a modern democratic nation, dependent as they are for their livelihood and welfare upon government and private authority, and vulnerable as they are to the pressures of orthodox opinion, are readily affected by official action directed at freedom of expression. Most of us shrink—more than we should perhaps—from tangling with government power, pitting our resources against the government in a criminal prosecution, or staking our reputation and career upon the outcome of an official proceeding. It is not easy, in our complicated society, to draft legislation which meets precisely a current abuse and does not infringe upon rights and privileges which the government is bound to leave alone. But the legislature must conform to a strict standard and it is the function and obligation of the courts to hold it to that standard.

We submit that Congress has not met that standard in this legislation. We refer the Court to the analysis of the registration provisions set forth above, particularly that part showing the effect of the legislation upon the liberal movement and upon freedom of opinion generally. At this point we note simply a few outstanding features of the Act:

(1) The standards established for determining what organizations must register are so loose as to include numerous organizations only remotely or coincidentally related to the Communist Party (§§ 3(3), (4), 13(e), (f)).

(2) The standards for membership in the Communist Party, which determine who must register publicly with the Department of Justice on pain of cumulative penalties, and for participation in the Communist Party, which determine who must be recorded on the books of the Communist Party, are so vague as to include numerous individuals only casually related to the Communist Party (§ 5 of the Communist Control Act).

(3) All these standards must be considered, not only as they may eventually be refined by the courts, but as they infringe on freedom of expression through raising a reasonable possibility of subjecting an individual or an organization to governmental action.

(4) The severity of the deprivations imposed by the Act make individuals reluctant to run the risk of incurring or even testing them.

(5) The deterrent effect of the drastic criminal provisions by which the registration provisions are enforced is bound to prevent many individuals from joining or assuming leadership in an organization likely to be the object of a proceeding to force registration.

(6) Although Congress insists that the purpose of the registration provisions is only to disclose the source of propaganda activities, the requirement that every member of a registered organization (including "Communist-front" organizations) be named in the open files of the Department of Justice subjects numerous individuals to exposure and stigma that is unnecessary to achieve the announced purpose.

(7) The impact upon voluntary associations makes their operation in controversial fields hazardous and ineffective.

For these and other reasons stated previously we urge the Court to strike down the registration provisions as not complying with the rule that such legislation must be narrowly drawn and not operate to hamper or destroy vital rights protected by the First Amendment.

**D. Conclusion on the First Amendment.**

The importance of the issues raised under the First Amendment can hardly be overstated. The legislation now before the Court infringes upon freedom of expression to a degree never before approached by an act of Congress. The Court must decide whether legitimate activities of voluntary associations can be curtailed and suppressed because the association is otherwise tainted or is influenced by a tainted organization. It must decide whether sweeping restrictions operating to harass free expression of the liberal movement and indeed the whole population will be sustained because they are ostensibly directed at the Communist movement. The case raises a further question of increasing significance in America—the extent to which a growing mass of non-criminal, indirect sanctions can be employed by government to vex and obstruct unorthodox but legitimate political activity.

We respectfully submit that the issues and the times call for a firm adherence to the fundamental purposes that the First Amendment was designed to serve.

## POINT II

**The Act is invalid as violative of the privilege against self-incrimination.**

The Internal Security Act, in its preamble, states it is designed to "protect the United States" through the device of "requiring registration of Communist organizations". Accordingly, the registration and reporting provisions to be found in Sections 7 and 8 of the Act are the heart of the legislation. They specify, *inter alia,* that, within designated periods of time (Section 7(c)), Communist-action organizations must register on forms prescribed by the Attorney-General (Section 7(a), (b)), such registration to be accompanied by a statement to contain, among other items of information:

> "* * * the name and last-known address of each individual who was a member of the organization at any time during the period of twelve full calendar months preceding the filing of such statement" (Section 7(d) (4)).

It is further prescribed that:

> "It shall be the duty of each Communist-action organization registered under this section to keep, in such manner and form as the Attorney General shall by regulations prescribe, accurate records of the names and addresses of the members of such organization and of persons who actively participate in the activities of such organization" (Section 7(f) (2)).

The principal duty to supply the described information apparently falls upon the organization. If the organization fails to do so:

> "* * * it shall be the duty of the executive officer (or individual performing the ordinary and usual duties of an executive officer) and of the secretary (or individual performing the ordinary and usual duties of a secretary) of such organization, and of such officer or officers of such organization as the Attorney General shall by regulations prescribe, to register for such organization, to file such registration statement, or to file such annual report, as the case may be" (Section 7(h)).

And if an organization is found to be a Communist-action organization, but it does not register as such, or if registered, fails to report all its members, then any individual whose membership in such organization is not reported for either of these reasons is obliged to register within a designated period of time with the Attorney General as a member of the organization (Section 8(a), (b). Failure by the individual member so to register is punishable by a maximum fine of $10,000 and/or maximum imprisonment of five years, and "each day of failure to register, whether on the part of the organization or any individual, shall constitute a separate offense" (Section 15(a) (2).[15]

The briefs of the parties, and the opinions below, have discussed fully those matters pertaining to the validity of the disclosures the Act compels of an organization and its officers. We direct our attention to that phase of the Act which compels individual members of an "action" organization to disclose such membership because we consider that this feature of the Act most flagrantly infringes Fifth Amendment guarantees in that it would compel individuals to profess membership in an organization which, by legislation ranging from the Smith Act to the Internal Security Act to the statute outlawing the Communist Party, has

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[15] It is not clear from the Act whether this penalty follows merely upon failure of a member to register in the described circumstances, or whether, after such failure, a final order directing the individual to register under Section 13 is required and prosecution under Section 15 is limited to instances of refusal to register in the face of such an individual registration order.

again and again been branded a criminal conspiracy by the Congress.

It is settled beyond dispute that, upon a proper claim of privilege, disclosure of membership in the Communist Party cannot be compelled. *Quinn* v. *United States*, 349 U. S. 155; *Emspak* v. *United States*, 349 U. S. 190; *Blau* v. *United States*, 340 U. S. 159. In view of the nature of organizations required to be registered as a Communist-action group under the Act (see Sections 2, 3(3), 4, 13(e)), it is likewise clear that, again upon a proper claim of privilege, an individual could not be compelled to disclose his membership in such an organization. That the Act bars the use of such disclosure as evidence against the individual in a subsequent criminal proceeding (Section 4(f)) does not obviate the Act's incompatibility with the constitutional privilege against self-incrimination since the limited immunity offered by the Act falls short of the reach of the privilege. *United States* v. *Bryan*, 339 U. S. 323; *Counselman* v. *Hitchcock*, 142 U. S. 547.

And so, on the most clearly settled principles, it appears that the key registration aspect of the Act seeks to compel a self-disclosure of criminality which the Fifth Amendment prohibits. The Board urges that this violation is, however, not properly now at issue because it is here raised by petitioner and not by a member to whom the privilege is personal,[16] and, further because it is premature since the occasion for self-disclosure may never arise if the organization or its officers choose to list the membership.

The privilege is, of course, personal. *Rogers* v. *United States*, 340 U. S. 367. But so is freedom of association and expression; yet this Court recognized the standing of an unincorporated association, as the aggregate of its mem-

[16] The statute under review proceeds from the basic proposition that members of a proscribed organization necessarily share its views and characteristics; yet respondent here denies petitioner's standing to assert constitutional rights of its membership.

bers and their rights, to assert those personal constitutional rights of its membership. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123. Moreover, since the privilege of the petitioner's members is violated by the Act, petitioner has standing to do so even apart from its status in law as the aggregate of its membership; the proposed injury to a constitutional right of petitioner's members because of membership, interferes with present and future membership in the petitioner organization thereby investing petitioner with standing to complain of that injury. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, *supra*; *Truax* v. *Raich*, 239 U. S. 33; *Pierce* v. *Society of Sisters, etc.*, 268 U. S. 510; *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229.

The timeliness of presently determining the constitutionality of the self-disclosure feature of the Act appears not only from the nature of the disclosure required by the Act but, more urgently, from the probability that if that determination is not made now, it may never be made.

If the Congress had passed a statute requiring each citizen to file with the Department of Justice on the first of each year a complete disclosure of all federal offenses committed by him during the preceding year, it could hardly be seriously urged that the citizen's exclusive remedy was to claim his privilege on the return date; the hypothetical statute, as the Act here, on its face calls for an incriminating disclosure and the formality of the claim of individual privilege is timely satisfied when the legislation is challenged. This is not a case where the question on its face is innocuous or where a non-incriminating answer might be possible in some individual case. If this were so, it might be necessary to await the individual claim of the privilege and consider the application of the Act in context. But here the question on its face and the *only* answer solicited are incriminating; in the circumstances the claim of privilege is not only unnecessary, but, as well, a gratuitous injury to the one required to claim his privilege as a condition to testing the statute.

Moreover, wherever the self-disclosure requirement of the Act becomes operative, the member is confronted with great difficulties as to when, if ever, if not now, he may claim the Act offends the privilege. Section 8 requires individual membership registration within 60 days after the Communist-action organization of which he is a member is declared by final order to be such an organization where it fails to register (Section 8(a)), or, where it registers but does not list an individual's membership, within 60 days of the member's knowledge of its registration and its failure to list his membership (Section 8(b)). If, within these preseribed periods, the member fails to disclose his membership or to file a claim of privilege, he may be deemed to have waived the privilege thereafter. Cf. *Roger* v. *United States, supra.* If, on the other hand, he files a claim of privilege within the specified time, although not individually requested to designate membership, he will have, in effect, directed attention to his possible membership and thereby, at the least, supplied a lead to his possible criminal involvement, and, at the most, exposed himself to the many legal, social, and economic sanctions imposed today upon a claim of privilege. Indeed, in view of the purposes of this legislation, a claim of privilege, which the respondent argues is indispensable to considering the constitutional question here treated, would probably make unnecessary any further action by the Justice Department against the claimant, thereby making it impossible according to the respondent's position, ever to obtain an adjudication by a member of whether the Act violates his guarantee against self-incrimination. In sum, if that feature of the Act requiring self-disclosure by members is not tested against the Fifth Amendment now, it may never be (Cf. *Barrows* v. *Jackson*, 342 U. S. 249, 257); or, if delayed until some time when the member may or must claim his privilege, great doubts remain as to when he may or must do so and challenging the Act is conditioned on unnecessary and serious injury to the claimant.

As Mr. Justice Frankfurter pointed out in *Joint-Anti-Fascist Refugee Committee* v. *McGrath, supra,* at 156:

> "If the ultimate impact of the challenged action on the petitioner is sufficiently probable and not too distant, and if the procedure by which that ultimate action may be questioned is too onerous or hazardous, 'standing' is given to challenge the action at a preliminary stage. *Terrace* v. *Thompson,* 263 U. S. 197; *Santa Fe Pac. R. Co.* v. *Lane,* 244 U. S. 492; see *Waite* v. *Macy,* 246 U. S. 606. It is well settled that equity will enjoin enforcement of criminal statutes found to be unconstitutional 'when it is found to be essential to the protection of the property rights, as to which the jurisdiction of a court of equity has been invoked.' E.g., *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 621. And if the determination challenged creates a status which enforces a course of conduct through penal sanctions, a litigant need not subject himself to the penalties to challenge the determination. *LaCrosse Telephone Corp.* v. *Wisconsin Employment Relations Board,* 336 U. S. 18; *Shields* v. *Utah Idaho Central R. Co.,* 305 U. S. 177."

No doubt the resolution of constitutional problems should be deferred until required by the necessities of a case. But where, as here, the legislation on its face, and in its essentials, involves clear violation of a constitutional guarantee, the earliest reasonably appropriate occasion for reviewing that legislation is the timely occasion therefor (cf. *Thornhill* v. *Alabama,* 310 U. S. 88); especially where, as here, awaiting the ultimate refinement of the issue causes confusion and injury.

## CONCLUSION

In the decade just ended American freedom suffered severe curtailment. Rights and privileges deemed well established at the beginning of the decade became insecure or non-existent. The result has been grave hurt to the country and the people.

At home, a new look was being given to the face of our democracy in the name of national security. Criticism was muted, opposition was practically silenced and the drive to conformity succeeded so far as to make applicable Mr. Justice Jackson's observation that the freedom to differ on "things that do not matter much" is "but the shadow of freedom." (*West Virginia State Board of Education* v. *Burnette*, 319 U. S. 624, 642.) An entire generation of the young, normally the promise of the future progress, was frightened into intellectual and political sterility, presenting the paradox of naturally rebellious youth more conservative than their elders. Mutual hatreds and suspicions were generated and national self-confidence was undermined. And all of this at a time when fresh thought, robust challenge and new, creative approaches were needed if domestic disaster and an atomic holocaust were to be averted. At one stage the picture became so dark that former Ambassador George J. Kennan felt forced to warn:

> "We can make no greater mistake, than to imagine that the tendencies which in other countries have led to the nightmare of totalitarianism will, as they appear in our midst, politely pause—out of some delicate respect for American tradition—at the point where they begin to affect our independence of mind and belief." (Convocation Address at Notre Dame University, New Republic, June 1, 1953.)

Abroad, America's moral prestige and standing declined precipitately. Our intentions and professions began to be

questioned. This brave, kindly, generous deeply pacific, democratic people began to look to the outside world as frightened, harsh, belligerent and on the primrose path to authoritarianism. Even to our best friends the junior Senator from Wisconsin became the symbol of a people the world once admired for its love of freedom.

There are signs that a revulsion is setting in against the extravagances of the past decade, and that a morning-after mood is developing. The outrages that have been perpetrated in the name of national security are being exposed. Congressional investigations, not into belief and association, but into the functioning of the measures and practices that have produced these outrages are taking place. The most sensitive are filled with shame and remorse at the follies that have been committed, and there is a fairly widespread determination to put a halt to them and make amends.

The Courts are playing a part in this national soul-searching. The decisions in *Quinn, Emspak, Lattimore, Schachtman, Nathan, Lamont, Sheiner* and others show a determination to restore constitutional rights and privileges to their former vigor. But so long as the obnoxious measures remain unrepealed and the practices unrepudiated there is the danger that their sponsors may resort and revert to them. This case presents this Court with the opportunity of eliminating one of the most obnoxious.

No western democracy has outlawed the Communist Party, though in some of them it polls upwards of twenty per cent of the national vote. The whole world is watching to see whether our recovery from the past decade's follies is genuine and lasting or whether the most powerful of the democracies is still so unsure of itself that it feels compelled to turn on its finest heritage and suppress a group whom the New York Times as long ago as August 22, 1950 called a "puny band". For, as the Chief Justice said at the American Bar Association Convention on August 21, 1955:

"But we now live in a different kind of world, an ideological world which disagrees violently on the proper relationship between the individual and the state, and in which there is a constant struggle for the minds and hearts of people.

We, and other free countries, are endeavoring to demonstrate that freedom and dignity for all constitute the only sound basis for world peace.

In such a gigantic struggle, where the eyes of a critical world are constantly upon everyone, the power of example is far more forceful than that of precept.

If the world is made to see that the provisions of our Constitution guaranteeing human rights are living things, enjoyed by all Americans, and enforceable in our courts everywhere, it will do much to turn the tide in our favor and therefore toward peace." (New York Times, Aug. 22, 1955.)

To the limits of its resources the National Lawyers Guild, which has itself been made to feel the lash of official disapproval, has in the course of the years defended the constitutional and civil liberties of a variety of people. In doing so the Guild has always believed that it was defending the Constitution, the Bill of Rights and our traditional freedom. To us, freedom is stripped of meaning if those whose views and hopes differ from ours are not allowed to urge their own. The right to think and speak freely is not only a precious good in itself, but has great social utility. Even ideas and projects which are ultimately proved false and wrong can be useful goads to true and right action. Mr. Justice Douglas' aphorism reaches the very heart of this case:

"We must be willing to meet an idea at the level of argument and counter argument, not at the police level of suppression." ("The Spoken Word", Columbia University Radio Program, as reported in the New York Times, October 24, 1954.)

With deepest sincerity we suggest that this Court can do much to restore freedom at home and our moral prestige and standing abroad by reversing the judgment below.

Respectfully submitted,

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